Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PETER A. LYNCH,

Petitioner,

v.

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO & FIREARMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals may, consistent with 5 U.S.C. § 552, et al., the Freedom of Information Act's ("FOIA") purpose of wide access to public records, deny an *in camera* review of withheld documents and/or a trial on the merits when proven agency bad faith conduct exists, that directly conflicts with the Sixth Circuit Court of Appeals opinion in *Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994) and the Eighth Circuit Court of Appeals opinion in *Miller v. U.S. Department of Agriculture*, 13 F.3d 260, 264 (8th Cir. 1993).

PARTIES TO THE PROCEEDINGS BELOW

Peter A. Lynch, petitioner herein, filed the action.

Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms, respondent.

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TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Peter A. Lynch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals which is the subject of this petition (App. 1-10, *infra*) was filed on January 28, 2000, and is not reported.

The opinion of the district court was entered on June 9, 1998 (App. 11-27, *infra*) and is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on January 28, 2000 (App. 1-10, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

The underlying action was based upon 5 U.S.C. § 552, et al., the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552(a)(3) provided petitioner the right to make a request under FOIA to the respondent:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

When the respondent denied the request and subsequent administrative appeal, a complaint seeking injunctive relief was filed pursuant to 5 U.S.C. § 552(a)(4)(B):

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the Court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

STATEMENT OF CASE

On September 23, 1996, a catastrophic fire occurred on the property located at 5200 Southland Drive, Salt Lake City, Utah resulting in losses over $1,000,000.00.

Part of the property was insured by Unigard Insurance Company ("UNIGARD").

The Salt Lake County Fire Department requested respondent ATF's National Response Team ("NRT") to assist in the investigation of the fire. NRT is activated when there is property damage over $1,000,000, or when the resources needed to investigate an incident exceed those locally.[1] Therefore, although ATF is a law enforcement organization, NRT when activated, based upon the above two factors, is not conducting a criminal investigation. Additionally, NRT, when activated, does not come in and take over an incident from the local incident commander. The NRT team leader is responsible for ensuring that the team is working under the local incident commander's direction.

On the day of the fire, UNIGARD retained a private fire investigator, Ronald Campbell, to investigate the cause and origin of the fire.[2] Mr. Campbell arrived on the fire scene that same day. NRT then directed UNIGARD, through Mr. Campbell, to bring heavy equipment to the site. Due to his apprehension of NRT using heavy equipment, Mr. Campbell videotaped NRT's conduct at the fire scene.

NRT's use of this heavy equipment destroyed key physical evidence at the fire scene.[3] Mr. Campbell was then precluded by NRT from retrieving the remains of the destroyed evidence. In Mr. Campbell's expert opinion,

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[1] See journal article, "ATF On Call," (App. 28-40, *infra*).

[2] See Declaration of Ronald Campbell (App. 64-66, *infra*).

[3] (App. 64-66, *infra*).

NRT's use of heavy equipment at the fire scene was not warranted.

UNIGARD, on the day of the fire, also retained an attorney, petitioner Peter A. Lynch ("LYNCH"), to assist them in their investigation of the loss.[4] LYNCH is presently the legal advisor to the San Diego County Fire and Arson Task Force.[5] He is also a legal columnist for the California Conference of Arson Investigators. LYNCH has taught courses and published many articles on the subject of fire scene spoliation. Finally, as an attorney, LYNCH has handled over one hundred fire cases. Subsequently, LYNCH on behalf of UNIGARD, and in his own right, filed a FOIA request about the NRT's actions at the site.

I. ADMINISTRATIVE PROCEEDINGS UNDER FOIA

On October 15, 1996, pursuant to FOIA, UNIGARD requested that ATF provide them a copy of all investigation reports pertaining to the fire.

On November 6, 1996, after not receiving a response, UNIGARD renewed the FOIA request. On February 26, 1997, when it still had not received a response, UNIGARD sent yet another request to ATF by certified mail.

On March 10, 1997, ATF finally responded and denied UNIGARD's request asserting that the "release of these records could reasonably be expected to interfere

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[4] See Supplemental Declaration of LYNCH (App. 41-49, *infra*).

[5] See http://www.calaction.com.

with enforcement proceedings." On March 19, 1997, UNIGARD filed an administrative appeal. On May 6, 1997, ATF denied UNIGARD's administrative appeal asserting the same grounds that it previously provided on March 10, 1997.

II. THE LOWER COURT PROCEEDINGS

On June 12, 1997, UNIGARD filed a Complaint for injunctive relief against ATF. On August 4, 1997, UNIGARD filed a Motion seeking the district court to compel ATF to compile a *Vaughn* Index of the withheld information. However, on September 14, 1997, the district court denied UNIGARD's Motion. Then, on December 13, 1997, the district court dismissed UNIGARD's Complaint for lack of subject matter jurisdiction. The district court ruled that UNIGARD did not have standing because the FOIA request was made in LYNCH's personal capacity and not on behalf of UNIGARD.

On December 22, 1997, LYNCH filed a Complaint against ATF seeking injunctive relief against ATF. Specifically, LYNCH was requesting that the district court order ATF to produce its investigative records related to the fire scene and that the court sanction ATF for bad-faith tactics.

On June 9, 1998, the district court, without holding an oral argument or conducting an *in camera* inspection of the withheld documents, issued an order granting ATF's Motion to Dismiss or for Summary Judgment and dismissed LYNCH's Complaint in its entirety. The district court ruled that the release of the information requested by LYNCH was compiled for law enforcement purposes

and could reasonably be expected to interfere with enforcement proceedings. However, the district court in its ruling failed to consider ATF's bad-faith actions at the fire scene and its bad-faith actions related to the denial of the FOIA request.

On August 5, 1998, LYNCH filed a Notice of Appeal before the Ninth Circuit Court of Appeals. On January 28, 2000, in an opinion not reported, the Ninth Circuit Court of Appeals affirmed the district court order *without* addressing ATF's bad-faith actions at the fire scene and its bad-faith actions related to the denial of the FOIA request.

EXISTENCE OF JURISDICTION BELOW

The district court had jurisdiction under 5 U.S.C. § 552(a)(4)(B).

The court of appeals had jurisdiction of the appeal under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' FAILURE TO CONDUCT *IN CAMERA* REVIEW OF THE WITHHELD DOCUMENTS WHEN THERE WAS PROVEN BAD FAITH ACTIONS BY THE RESPONDENT, CONFLICTS DIRECTLY WITH OPINIONS IN THE SIXTH CIRCUIT AND EIGHTH CIRCUIT COURTS OF APPEALS AND THUS REQUIRES THIS COURT TO SETTLE THE CONFLICTING ISSUE AMONG THE CIRCUITS

In the instant case, the Ninth Circuit's failure to conduct an *in camera* inspection and/or a trial on the merits when there was *proven* bad-faith actions by the respondent with respect to its underlying activities related to the FOIA request and *proven* bad-faith actions by the respondent with respect to its denial of the FOIA request, conflicts directly with the Sixth Circuit Court of Appeals' opinion in *Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994) and the Eighth Circuit Court of Appeals' opinion in *Miller v. U.S. Department of Agriculture*, 13 F.3d 260, 264 (8th Cir. 1993).

At the court of appeals level, conflicting decisions regarding the issue of when proven bad-faith actions on the part of the government agency with respect to the underlying activities related to the FOIA request necessitate an *in camera* inspection and/or a trial on the merits are proliferating and the need for guidance from this Court is acute. This case is a rare opportunity to provide that guidance.

In *Jones v. FBI*, the Sixth Circuit faced the same issue as the Ninth Circuit did in the present case, the issue of when there is proven bad-faith actions on the part of the

government agency with respect to the underlying activities related to the FOIA request, whether the court should accept the government's affidavits alone *without* conducting either an *in camera* inspection and/or a trial on the merits. The Sixth Circuit held that when there is evidence of bad-faith actions on the part of the government agency with respect to the underlying activities related to the FOIA request, a court may *not* grant summary judgment on the basis of the government's affidavits alone *without* conducting either *in camera* inspection and/or a trial on the merits:

> where such evidence is strong, it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment on the basis of *Vaughn* affidavits alone. It would risk straining the public's ability to believe – not to mention the plaintiff's – that the courts are neutral arbiters of disputes whose procedures are designed to produce justice out of the clash of adversarial arguments.

Jones v. FBI, 41 F.3d, *supra* at 242-243. In *Jones*, the court further noted that an *in camera* review is warranted, especially involving actual agency bad faith – "where it becomes apparent the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called 'cover-up' is presented, government affidavits lose credibility." *Id.*

Similarly, the Eighth Circuit Court of Appeals in *Miller v. U.S. Department of Agriculture*, 13 F.3d, *supra* at 264, also found that evidence of bad faith can overcome the government's affidavits necessitating an *in camera* review and/or trial on the merits.

In the present case, the Ninth Circuit rejected the holdings in *Jones* and *Miller* by stating in a conclusory manner that "none of Lynch's allegations of bad faith indicate that the district court was required to have engaged in further scrutiny of ATF's declarations . . . ".[6] Rather, the Ninth Circuit simply believed that it was permissible to rely on ATF's boiler plate affidavits despite the *undisputed* evidence showing the following: (1) the fire scene was destroyed by the ATF;[7] (2) ATF's report about such destruction has been hidden; (3) an ATF agent threatened UNIGARD's lead fire investigator, Mr. Campbell, after an article written about the destruction of the fire scene appeared in *Fire Engineering*. "After The Fire's Out: Spoliation of Evidence and The Line Firefighter," *Fire Engineering* (January 1998), Vol. 151, No. 1.[8] The author of this article was LYNCH. The article contained photographs from the subject fire scene showing ATF agents destroying key physical evidence.[9] Accordingly, there is a strong public interest in the public's right to know whether the ATF was involved in mishandling evidence at the fire scene and attempted to cover it up. This is especially true based on prior misconduct of the respondent highlighted by Congressional hearings responding to the Waco, Texas and Ruby Ridge incidents.

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[6] (App. 6, *infra*).

[7] See Mr. Campbell's declaration regarding destruction of evidence (App. 64-66 *infra*).

[8] See a copy of the article (App. 50-63, *infra*) and LYNCH's Supplemental Declaration regarding threat to Mr. Campbell (App. 47, *infra*).

[9] (App. 57, *infra*).

The public has a right to know in the present case if the respondent was again involved in misconduct.

Yet contrary to the holdings in *Jones* and *Miller*, the Ninth Circuit did not order an *in camera* review and/or a trial on the merits although both options would have ensured a finding that the courts are neutral arbiters of disputes. Therefore, the Ninth Circuit's rubberstamping questionable affidavits after *proven* agency bad faith directly conflicts with the holdings *Jones* and *Miller* and is an error necessitating reversal.

The decision in the instant case by the Ninth Circuit further creates a conflict with the FOIA's purpose of providing wide-ranging public access to government documents. The Act seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure information from possibly unwilling official hands. *EPA v. Mink*, 410 U.S. 73, 80 (1973). Disclosure is the objective of the Act. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The decision below therefore contradicts not only the Sixth and Eighth Circuits' holdings with respect to bad-faith evidence, but also the express purpose of the Act. The Court should grant certiorari to review these important conflicts.

In sum, the court of appeals' split on the availability of *in camera* review and/or a trial on the merits when there is *proven* bad-faith actions on the part of the government agency with respect to the underlying activities related to the FOIA request is critical. There is no realistic prospect for resolution of this far-reaching conflict without a decision by this Court. Any appellate decision

hereafter will simply side with the Sixth and Eighth Circuit position or side with the Ninth Circuit and, at best, shift the weight of authority in one direction or the other from its current state. As a result of the difficulty of securing appellate review, trial courts will rarely obtain guidance from the Federal Courts of Appeals on this issue, and the opportunities for this Court to review the issue will be few. This case presents such an opportunity and the Court should take it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 20, 2000

Respectfully submitted,

COZEN AND O'CONNOR
PETER A. LYNCH
Counsel of Record
SAM S. SHELDON
Attorneys for Petitioner

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER A. LYNCH, Plaintiff-Appellant, v. DEPARTMENT OF THE TREASURY; BUREAU OF ALCOHOL, TOBACCO & FIREARMS, Defendants-Appellees.	No. 98-56368 D.C. No. CV-97-02290-JNK MEMORANDUM[1] (Filed Jan. 28, 2000)

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Argued and Submitted January 4, 2000
Pasadena, California

Before: TROTT and W. FLETCHER, Circuit Judges, and MOLLOY, District Judge.[2]

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[2] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

Overview

Plaintiff-appellant Peter Lynch ("Lynch") appeals the district court's order granting a summary judgment motion brought by defendant-appellee Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms ("ATF") in Lynch's action seeking release of records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The records Lynch requested related to a fire in Salt Lake City in September 1996. The district court concluded that ATF properly withheld the records under FOIA's exemption for law enforcement records. *See* 5 U.S.C. § 552(b)(7)(A).[3] On appeal, Lynch argues that the district court did not have an adequate factual basis to make its decision. Alternatively, Lynch argues that the court erred in concluding that ATF properly withheld the records under the "law enforcement" exemption. This court has jurisdiction pursuant to 28 U.S.C. § 1291. We AFFIRM.

We will not recite the facts of the case here, as the parties are familiar with them.

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[3] Under section 552(b)(7)(A), records need not be released if they are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings. . . . " 5 U.S.C. § 552(b)(7)(A) (1996).

Discussion

A. Standard of Review

Review of a grant of summary judgment in a FOIA case is unlike the normal standard for summary judgment review. Instead of determining whether a genuine issue of material fact exists, we employ a two-step standard. First, the court determines whether the district court had an adequate factual basis for its decision. *Fiduccia v. United States Dep't of Justice*, 185 F.3d 1035, 1040 (9th Cir. 1999). If so, the court undertakes a de novo review of the district court's conclusion as to the applicability of an exemption from FOIA's disclosure requirement. *Id.* Factual findings underlying this conclusion are reviewed for clear error. *Id.*

B. Adequate Factual Basis

Lynch first argues that this court should remand the case to the district court because the district court did not have an adequate factual basis for determining whether the requested records fell within the section 552(b)(7)(A) exemption. The district court based its conclusion that the documents were exempt on the declarations of four individuals involved in the fire investigation. Citing *Lewis v. IRS*, 823 F.2d 375, 380 (9th Cir. 1987), and *Weiner v. FBI*, 943 F.2d 972, 978 n.5 (9th Cir. 1991), the district court concluded that neither a *Vaughn* index[4] nor an in camera

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[4] A *Vaughn* index is a list of all documents requested by a FOIA plaintiff, describing the document sufficiently to identify it, but not so much as to reveal the secret nature of any

inspection of the records were necessary when a FOIA matter involves the (b)(7)(A) exemption.

In reviewing an agency's decision to withhold records under FOIA, a district court "may examine the contents of such agency records in camera." 5 U.S.C. § 552(a)(4)(B) (Supp. 1999). However, "[t]he in camera review provision is . . . designed to be invoked when the issue before the district court could not be otherwise resolved." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). While ATF has the burden of proving the applicability of an exemption from FOIA, *see Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996), it may meet this burden by submitting detailed affidavits showing that the information and records requested logically fall within the claimed exemptions. *See id.; see also Lewis*, 823 F.2d at 378 ("If the affidavits contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption, the district court need look no further.") (internal quotations omitted); *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998), *as amended* (1999) ("[T]he affidavits must show, with reasonable specificity, why the documents fall within the exemption."); *Wright v. OSHA*, 822 F.2d 642, 646 (7th Cir.

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information. *See Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973). When employed by a district court, the government is typically required to cross-reference each item on the list with its purported justification for exemption. *Id.* at 827. The purpose of the index is to "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991).

1987) ("The agency need only provide sufficient information to allow a court to review the agency's claimed exemption."). Boilerplate affidavits are not enough to sustain the agency's burden. *See Wiener*, 943 F.2d at 978-79; *see also Miller v. United States Dep't of Agric.*, 13 F.3d 260, 263 (8th Cir. 1993) (stating that FOIA "would stand as a universal bar against disclosure" if boilerplate, conclusory affidavits were enough).

ATF's declarations made clear that the records Lynch requested included witness statements, reports of investigation, cause and origin reports, photographs, and surveillance authorizations. In addition, the declarations stated that premature release of these records could harm the inter-agency task force's efforts at corroborating witness statements and determining the possible cause and motive behind the fire; alert potential suspects as to the investigation's existence; disclose the task force's investigative focus; identify and cause harm to witnesses; interfere with surveillance; or result in destruction of evidence.

These declarations have much more in common with the specificity and detail of the affidavits offered in *Lewis*, 823 F.2d at 378-79, than the boilerplate affidavits other courts have found insufficient to sustain an agency's burden in FOIA cases. *See Wiener*, 943 F.2d at 978-79; *Campbell*, 164 F.3d at 30-31; *Wright*, 822 F.2d at 646. Unlike the agencies' explanations in *Wiener* and *Campbell*, which failed to make any specific references to the subject matter underlying the records, here the ATF declarations contextualize their claims for exemption. The declarations repeatedly refer to the fire and its investigation, note the specific categories of records in the investigative file, and

relate the type of dangers one could reasonably expect to encounter upon release of the various kinds of information. While the declarations did not "tailor the explanation[s] to the specific document withheld," *Wiener*, 943 F.2d 979, they are sufficient to show that the information requested "logically falls within the claimed exemptions." *Minier*, 88 F.3d at 800. Furthermore, under exemption (b)(7)(A), the government need not "make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." *Lewis*, 823 F.2d at 380. *But see Fiduccia*, 185 F.3d at 1043 (noting, in a case discussing other (b)(7) exemptions, "[w]here documents are withheld altogether, the requester needs a *Vaughn* index of considerable specificity to know what the agency possesses but refuses to produce").

Because ATF's declarations are sufficiently detailed and tailored to the case at hand, and because they demonstrate that the requested records logically fall into the identified FOIA exemption, we conclude that the district court had an adequate factual basis for its decision in this case. None of Lynch's allegations of bad faith indicate that the district court was required to have engaged in further scrutiny of ATF's declarations describing the records requested and the harm expected to result from their release.

C. The Applicability of the "Law Enforcement" Exemption

To qualify for an exemption under section 552(b)(7)(A), the records Lynch requested must have been

"compiled for law enforcement purposes" and must "reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (1996). To fit within the section 552(b)(7) set of exemptions, records need only have been compiled for a law enforcement purpose at the time the government invoked the exemption. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153-55 (1989). As ATF's declarations make clear, at the time Lynch made his FOIA request, both the ATF and the inter-agency task force investigations were ongoing. By the time ATF denied Lynch's FOIA request, ATF had just closed its own individual investigation; however, the inter-agency task force – of which ATF was a member – continued its investigation. Even though ATF itself may not have been contemplating any law enforcement proceedings at the time Lynch's FOIA request was denied, the records at issue were related to the inter-agency task force's investigation. *See New Eng. Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1976) (holding that records fit within exemption even though file from which they came was labeled "closed," where they were still closely related to a pending open case). Because the inter-agency task force's investigation continued throughout Lynch's FOIA request, it is inconsequential that ATF may have closed its own individual investigation prior to Lynch's notice that his administrative appeal had been denied. Therefore, the district court correctly concluded that the requested records were compiled "for law enforcement purposes."

Similarly, the determination as to whether a release of records could reasonably be expected to interfere with enforcement proceedings is to be made as of the time the agency decided to withhold the documents. *See Bonner v.*

United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991); *Institute for justice and Human Rights v. Executive Office of the U.S. Attorney*, No. C 96-1469 FMS, 1998 WL 164965, at *3 (N.D. Cal. Mar. 18, 1998). At the time Lynch filed his FOIA request, both ATF and the inter-agency task force were investigating the fire. By the time his administrative appeal was denied, ATF had closed its inquiry, but the task force's investigation continued. The vitality of the investigation at the time of Lynch's request certainly evidences that some legal action was at least "contemplated" or "in prospect." *See Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1040 (7th Cir. 1998) (records reasonably expected to interfere with ongoing investigation even though originally compiled for now closed investigation that is the subject matter of the FOIA request at issue); *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995) (law enforcement proceeding must be "pending or prospective"); *Miller*, 13 F.3d at 263 (government may withhold documents where enforcement proceeding "then pending or contemplated"); *New Eng. Med.*, 548 F.2d at 383 (FOIA not intended to prevent withholding where enforcement proceeding "pending or in prospect").

After demonstrating that a law enforcement proceeding exists – whether "pending," "prospective," or merely "contemplated" – ATF must also show that release of the requested records could reasonably be expected to "interfere" or "cause some articulable harm" to those proceedings. *Manna*, 51 F.3d at 1164. The district court concluded that the ATF declarations – stating that release of the records would highlight areas of investigative concern,

alert potential suspects as to the existence of the investigation, identify possible witnesses, interfere with surveillance, or result in the destruction of evidence – were sufficient for this purpose. These are similar to the types of dangers found sufficient for exemption in *New Eng. Med.*, 548 F.2d at 383, and *Wright*, 822 F.2d at 647. Moreover, the district court's conclusion is fully consistent with *Lewis*, which held that, under exemption (b)(7)(A), an agency "need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings." *Lewis*, 823 F.2d at 380 (applying earlier statutory language requiring that disclosure "would" interfere with enforcement proceedings).

The fact that no governmental agency had, at the time of Lynch's request, filed a criminal charge or civil action relating to the fire proves nothing dispositive about the active nature of the investigation. Moreover, that no agency has filed such a charge or action since the denial of Lynch's request is not relevant to the question at hand. *See Bonner*, 928 F.2d at 1152. If Lynch now believes that, three years after the fire, no proceeding is currently pending or contemplated, his recourse is to resubmit an FOIA request for the records at this time.

Finally, Lynch argues that the district court erred when it declined to consider his identity in the course of determining whether release of the records would reasonably interfere with enforcement proceedings. Notwithstanding the Third Circuit's apparently contrary ruling in *Manna*, 51 F.3d at 1164, the district court's decision was proper under both Supreme Court and Ninth Circuit precedent. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("[T]he

identity of the requesting party has no bearing on the merits of his or her FOIA request."); *Schiffer v. FBI*, 78 F.3d 1405, 1411 (9th Cir. 1996) (same).

For the foregoing reasons, it is clear that the records Lynch requested were compiled for law enforcement purposes, and their release could reasonably be expected to interfere with enforcement proceedings.

Conclusion

The district court had an adequate factual basis to determine whether ATF correctly invoked the "law enforcement" exemption in withholding the records Lynch requested. Furthermore, the district court correctly concluded that ATF properly withheld the requested records. Therefore, we AFFIRM the district court's order granting summary judgment for ATF.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PETER A LYNCH, Plaintiff, vs. DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Defendant.	CASE NO. 97-CV-2290 K (POR) ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S REQUEST FOR IN CAMERA REVIEW; AND DENYING PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE (Filed Jun. 9, 1998)

Defendant Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms ("ATF") has filed a motion to dismiss or for summary judgment. Plaintiff Peter A. Lynch has filed an opposition and cross-motion for summary judgment. Defendant opposes plaintiff's cross-motion. Both parties are represented by counsel.

I. BACKGROUND

Defendant ATF is an agency of the United States charged with responsibility for the administration of federal investigations of potential arson and criminally related fires. Plaintiff represented Unigard Insurance Company which Insures a commercial structure that suffered a catastrophic fire loss on September 23, 1996 at

5200 Southland Drive, Salt Lake City, Utah ("the site"). Defendant ATF assumed investigative jurisdiction of the fire site precluding private parties such as Unigard from Investigating and accessing the site. Plaintiff asserts that ATF improperly used heavy equipment on the site during its investigation.

By letter dated February 26, 1997, plaintiff submitted a "request for information" to ATF pursuant to the Freedom of Information Act ("FOIA") 5 U.S.C. § 552. Plaintiff sought information about the site, including (1) all reports and related records concerning the fire; (2) all reports and records concerning any testing, inspection or analysis of any evidence collected at the scene; and (3) all witness statements and interviews concerning the fire. (Pla. Exh. C, Letter of 2/26/97).

By letter dated March 10, 1997, ATF denied plaintiff's request for information alleging that the material was exempt from public disclosure pursuant to 5 U.S.C. § 557(b)(7)(A). This exemption permits a government agency to withhold "records or information complied for law enforcement purposes" to the extent that disclosure "could reasonably be expected to interfere with enforcement proceedings." On March 19, 1997, plaintiff submitted an administrative appeal, pursuant to 5 U.S.C. § 552(a)(6)(A), of the denial of his FOIA request. On May 6, 1997, the appeal was denied on the ground that the records were exempt from disclosure under the law enforcement exemption. Specifically, ATF stated that premature release of the requested investigative materials would interfere with an ongoing criminal investigation.

In late April 1997, ATF closed its investigation of the fire at the site. (Def. Exh. D(D), Cooper Decl. ¶ 9; Def. Exh. D(E), Samacki Decl. ¶ 9). ATF participates in an inter-agency arson task force along with the Salt Lake City Fire Department, Salt Lake County Fire Department, and the Salt Lake County Sheriff's Department. (Def. Exh. E, Samacki Supp. Decl. ¶ 1; Def. Exh. F, Barker Decl. ¶ 1). Members of the task force conduct their investigations jointly. *Id.* The Salt Lake County Fire Department, along with the Salt Lake County Sheriff's Department, is still investigating the matter as a part of the inter-agency task force. (Def. Exh. E, Samacki Supp. Decl. ¶ 7).

On June 12, 1997, Unigard Insurance Company filed an action for judicial review of the denial of the administrative appeal filed by Lynch pursuant to 5 U.S.C. § 552(a)(4)(B). *Unigard Insurance Company v. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, Case No. 97-CV-1126-K (AJB). On August 15, 1997, Unigard filed a motion seeking to compel ATF to compile, pursuant to the holding in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, an itemized index of the materials withheld along with justification for the refusal to produce each category of records. By order of September 14, 1997, this court denied Unigard's motion to compel production of a *Vaughn* index, holding that the materials requested "could reasonably be expected to interfere with the law enforcement proceeding currently underway in the State of Utah." Case No. 97-CV-1126-K(AJB), Order of 9/14/97 at 8. This court further stated, "[b]ecause the documents are properly exempt under exemption (b)(7)(A), a *Vaughn* index is not required." *Id.* (citing *Miscaviage v. Internal Revenue Service*, 2 F.3d 366,

367 (11th Cir. 1993)). A *Vaughn* index need not be produced for exemption (b)(7)(A) withholdings because (b)(7)(A) is a general exclusion, by which the entire class of materials is "per se exempt from disclosure regardless of the content of each document withheld." *Id.* (quoting *Weiner v. Federal Bureau of Investigation*, 943 F.2d 972, 978 n.5 (9th Cir. 1991)). By order of December 13, 1997, this court dismissed Unigard's action for lack of subject matter jurisdiction, holding that Unigard lacked standing to bring an action for judicial review of the denial of a FOIA request where Unigard did not make that request. Case No. 97-CV-1126-K(AJB). Order of 12/13/97 at 5-6.

On December 22, 1997, plaintiff Lynch filed the instant action seeking the same relief previously sought by Unigard in Case No. 97-CV-1126-K(AJB). In dismissing Unigard's action, this court found that Lynch made the FOIA request at issue. Thus, the issue of standing raised in the prior action is not present here.

Defendant now moves to dismiss plaintiff's action, or, in the alternative, for summary judgment. Plaintiff opposes and cross-moves for summary judgment. Defendant opposes the cross-motion. The court notes that both parties to this action have discussed the filings in Case No. 97-CV-1126-K (AJB) as if they were filed in this action. Unless the parties have submitted these filings as exhibits in this case, they are not part of the record under consideration here.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure to state a claim

upon which relief can be granted. Such a dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Under Rule 12(b)(6), a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his or her claim for relief. *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991). In applying this standard, the court must treat all of plaintiff's factual allegations as true. *Experimental Eng'g. Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980). On a Rule 12(b)(6) motion, the court assumes that all general allegations "embarce whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994) *cert. denied*, 515 U.S. 1173 (1995). However, the court does not have to accept as true conclusory allegations that contradict facts which may be judicially noticed or which are contradicted by documents referred to in the complaint. *See, e.g., Mallis v. United States Bankr. Court*, 828 F.2d 1384, 1388 (9th Cir. 1987). The court likewise, is not bound to assume the truth of legal conclusions simply because they are stated in the from of factual allegations. *Western Mining Counsel v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

Rule 12(b) also provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be

> treated as one for summary judgment and disposed of as provided in Rule 56. . . .

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. The movant has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress and Co.*, 90 S.Ct. 1598, 1608 (1970). The burden then shifts to the nonmovant to show that summary judgment is not appropriate. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553. To make such a showing, the nonmovant must go beyond the pleadings to designate *specific facts* showing that there is a genuine issue for trial. *Id.* However, in considering this motion, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his or her favor. *Anderson v. Liberty Lobby Inc.*, 106 S.Ct. 2505, 2513 (1986).

III. DISCUSSION

A. Defendant's Motion to Dismiss or for Summary Judgment

Defendant moves to dismiss or for summary judgment on the grounds that the information subject to plaintiff's FOIA request falls within an exemption to the disclosure requirements of FOIA. Because this motion relies on matters outside of the pleadings, the court considers it as a motion for summary judgment under Rule 56.

Under FOIA, a district court has the authority "to enjoin the agency from withholding agency records and to order the production of any agency records improperly

withheld from the complainant." 5 U.S.C. § 552(a)(4)(b). Thus, to obtain an injunction proving defendant from withholding the information sought, plaintiff must show that defendant "('improperly;' (2) 'withheld;' (3) 'agency records.' " *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S 136, 150 (1980). "Judicial authority to devise remedies and enjoin agencies can only be invoked if the agency has contravened all three components. . . . " *Id.* Here, both parties agree that defendant withheld agency records. Thus, the only question before the court is whether that withholding was improper.

If an agency record is withheld, the withholding is improer if the document does not fall within a FOIA exemption. *Spurlock v. Federal Bureau of Investigation*, 69 F.3d 1010, 1016 (9th Cir. 1995). In determining whether the withholding was improper, the court considers whether the document fell within the exemption at the time it was invoked by the agency in response to the FOIA request. *Bonner v. United States*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (holding that when a district court reviews an agency decision to withhold information, that decision "ordinarily must be evaluated as of the time it was made.")

In order to prevail on its summary judgment motion, defendant must demonstrate that the records fell within an exemption at the time the exemption was invoked. To meet its burden of demonstrating that the records fall within the exemption, defendant may offer, *inter alia*, affidavits/declarations of agency employees as evidence. *See Lewis v. Internal Revenue Service*, 823 F.2d 375, 378 (9th Cir. 1987). To defeat this motion, plaintiff must present some evidence that would raise a genuine issue for trial

concerning whether the records fit within that exemption at the tie defendant invoked it.

Defendant has submitted declarations in support of its contention that the records at issue fall within the (b)(7)(A) exemption. Defendant's exhibits include the declarations of: Robert L. Pritchett, the chief of the records disclosure branch of ATF (Def. Exh. C(A)); John Cooper, an ATF Special Agent responsible for monitoring, coordinating, and supporting field enforcement activities within the Special Operations area, which includes under cover operations, witness security, and informant utilization (Def. Exh. D(D)); Jeffrey P. Sarnacki, an ATF Special Agent in the Salt Lake City Field Office who is a Certified Fire Investigator assigned to the Inter-agency arson task force which investigates all fires occurring within Salt Lake City and unincorporated Salt Lake county (Def. Exh. D(E) and E); and Dennis C. Barker, a Captain in the Salt Lake County Fire Department and Commander of the Interagency Fire Investigation Task force (Def. Exh. F).

To show that there remains a genuine issue for trial, plaintiff has submitted his own declaration and the declaration of Ronald A. Campbell, a Certified Fire Investigator who was with the Pendleton Fire Department for 27 years and, since retiring, has operated a fire investigation business for 7 years (Pla. Exh. D).[1]

Here, defendant asserts that the requested records fall within FOIA's law enforcement exemption, 5 U.S.C. § 557(b)(7)(A). This exemption provides in pertinent part:

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[1] Campbell was hired by Unigard Insurance Company to investigate the fire at the site.

> (b) This section does not apply to matters that are –
>
> (7) records or information complied for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> (A) could reasonably be expected to interfere with enforcement proceedings. . . .

5 U.S.C. § 557(b)(7)(A). In 1996, FOIA was amended to broaden the scope of the (b)(7) exemptions. *See e.g. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9 (noting that the amendments represent "a considered congressional effort 'to ease considerably a Federal law enforcement agency's burden in invoking" the exemption under § 557(b)(7)). The amendments eliminated the former requirement that the records be investigatory in nature to come under the exemption; so long as the records are complied for "law enforcement purposes," they are exempt. *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 630-31 (1982).

Defendant submits that there can be no question that information gathered in an ATF investigation is complied for law enforcement purposes. The Secretary of the Treasury has statutory responsibility to enforce federal firearms and explosives laws. *See* Gun Control Act of 1968, Section 103, Public Law 90-618, and 18 U.S.C. § 847. These responsibilities have been delegated to ATF by Treasury Order No. 120-01. *See also* 27 C.F.R. § 70.33. ATF is in fact a law enforcement agency that was called upon to investigate the fire at the site.

Plaintiff contends that there was no law enforcement purpose involved in this ATF investigation. Plaintiff has submitted an article about ATF's National Response Team that was published in the membership magazine for the National Fire Protection Association. *See* Pla. Exh. 2.[2] According to plaintiff, the magazine article shows that there was no law enforcement purpose for the investigation in which the information was complied, because: (1) the article explains that when ATF assists in local investigations the leader always ensures that the ATF team works under the direction of the local chief, and (2) the article shows that the goal of ATF's National Response Team's investigations is not always to determine criminal intent. Even if this magazine article were accepted as evidence, it does not raise a triable issue concerning whether the information was complied for a law enforcement purpose. First, there is no reason to believe that ATF's position as the lead agency or as an assisting agency in an investigation has any bearing on whether the information is compiled for a law enforcement purpose. Second, for the purposes of the (b)(7)(A) exemption, the law enforcement purpose need not relate to proceedings that are criminal in nature. *See Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1165 (3rd Cir. 1995) (including civil action within the meaning of "law enforcement"); *Injex Indus. v. National Labor Relations Board*, 699 F.Supp. 1417, 1420 (N.D. Cal. 1986) (including regulatory proceedings within the meaning of "law enforcement").

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[2] Plaintiff has established no foundation to show that this article should be considered as any sort of evidence by the court.

The court finds that there is no genuine issue concerning whether the information was complied for law enforcement purposes. The only remaining question is whether disclosure of the information "could reasonably be expected to interfere with enforcement proceedings." *See* 5 U.S.C. § 557(b)(7)(A).

Disclosure of information interferes with law enforcement proceedings whenever the government's case would be harmed by premature release of information or where disclosure would impede an investigation prior to enforcement proceedings. *See Bevis v. Dep't of State*, 801 F.2d 1386, 1388 (D.C. Cir. 1986). Again, the court emphasizes that this determination is made in view of the circumstances at the time the exemption was invoked. *See Bonner*, 928 F.2d at 1152. Thus the court will not address the parties' discussions concerning the current status of any investigation.

Defendant denied plaintiff's request for information on March 10, 1997, invoking exemption (b)(7)(A). Plaintiff thereafter filed an administrative appeal of this decision. By letter of May 6, 1997, defendant informed plaintiff that his administrative appeal had been denied. At the time defendant initially denied plaintiff's request, defendant's investigation into the fire was ongoing and defendant determined that release of the files may have hindered the investigation. (Def. Exh. C(A), Pritchett Decl. ¶ 25-26). In late April 1997, ATF closed its investigation of the fire at the site. (Def. Exh. D(D), Cooper Decl. ¶ 9; Def. Exh. D(E), Samacki Decl. ¶ 9). Contrary to plaintiff's assertions, ATF's closure of its investigation is not dispositive of this issue. Even after an investigation is closed, the (b)(7)(A) exemption may be applicable if disclosure could

be expected to interfere with a related law enforcement proceedings. *See e.g. New England Medical Center Hospital v. National Labor Relations Board*, 548 F.2d 377, 385-86 (1st Cir. 1976) (applying exemption (b)(7)(A) to closed file documents where they "remain fully relevant to a specific pending enforcement proceedings, although, to be sure, not the one for which they were precisely intended"). Here, the Salt Lake County Fire Department, along with the Salt Lake County Sheriff's Department, continued to investigate the matter as a part of the inter-agency task force in which defendant ATF participates. (Def. Exh. E, Samacki Supp. Decl. ¶ 7). State and local law enforcement proceedings qualify for the (b)(7)(A) exemption. *Cf. Hopkinson v. Shillinger*, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989).

According to plaintiff, defendant must present document by document explanations to show that the information would interfere with the investigation. Plaintiff is mistaken. The Supreme Court has held that the (b)(7)(A) exemption may be applied generically, rather than on a document by document basis. *See National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). The Ninth Circuit has described (b)(7)(A) as a "general exclusion." *Lewis v. Internal Revenue Service*, 823 F.2d 375, 380 (9th Cir. 1987). Indeed, the Ninth Circuit explained that a document by document index ("*Vaughn* index") was "not required in *Lewis* because the entire class of documents requested was *per se* exempt from disclosure regardless of the content of each document withheld." *Weiner v. Federal Bureau of Investigation*, 943 F.2d 972, 978 n.5 (9th Cir. 1991). Thus, neither a *Vaughn* index, nor a

document-by-document *in camera* review are necessary when the matter involves the (b)(7)(A) exemption.

Here, the declarations submitted by defendant list the types of information by category and give an explanation of how the information could interfere with the investigation. According to the Samacki declaration, the information includes witness statements, reports of investigation, cause and origin report, photographs, and surveillance authorizations. Def. Exh. E, Samacki Decl. ¶ 6. Defendant asserts that release of any records, including photographs, would highlight areas of investigative concern. *Id.* According to the Pritchett declaration, which also lists the information by category,[3] at the time plaintiff's request was denied, "it was ATF's belief that the release of these records could, among other things, alert potential suspects as to the existence of the investigation, identify possible witnesses, interfere with surveillance, or result in the destruction of evidence." Def. Exh. C(A), Pritchett Decl. ¶ 26. Defendant has satisfied its burden of showing that disclosure of the information could reasonably be expected to interfere with law enforcement proceedings.

The court finds that plaintiff's arguments concerning alleged spoliation of evidence at the fire scene by ATF are

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[3] The Pritchett declaration also lists the types of information in the file, but omits "photographs" as a category. Def. Exh. C(A). Pritchett Decl. ¶ 24. Plaintiff asserts that the absence of photographs from Pritchett's declaration shows that defendant is acting in bad faith in this action. Defendant voluntarily informed the court that photographs should have been included, but were omitted by clerical error. *See* Def. Exh. C. The court does not find that defendant acted in bad faith.

completely irrelevant to the issues before the court on this action for judicial review of a FOIA decision. Whether such spoliation is actionable has no bearing on the issue of whether, *under FOIA*, ATF should be required to disclose the information. The court therefore finds irrelevant any evidence of such spoliation. This court makes no determination of whether plaintiff may be able to bring some cause of action against ATF in relation to the spoliation allegations.

Defendant establishes that (1) the information was compiled for law enforcement purposes; and (2) law enforcement agencies continued to investigate the fire at the time plaintiff's request was denied and at the time his administrative appeal was denied, such that release of information could reasonably be expected to interfere with enforcement proceedings. Plaintiff fails to raise any genuine triable issue. Accordingly, the court grants defendant's motion for summary judgment.

B. Plaintiff's Cross-Motion for Summary Judgment

For the same reasons that the court grants defendant's motion for summary judgment, the court denies plaintiff's cross-motion for summary judgment. Plaintiff cannot show that, as a matter of law, the records do not fit within the (b)(7)(A) exemption.

C. Plaintiff's Request for Judicial Notice

Plaintiff requests that the court take judicial notice of the videotape evidence of spoliation filed in Case No. 97-

CV-1126-K(AJB) and the declaration of Ronald A. Campbell filed in that case. Plaintiff wants to ensure that the court considers these items of evidence in deciding these cross-motions. First, as noted above, any declarations resubmitted as exhibits in this action are part of the record in this case. Because plaintiff has attached the Campbell declaration as an exhibit in this case, it is part of this record and has been considered. Plaintiff's request for judicial notice as to this document is denied as unnecessary.

Plaintiff did not submit the videotape as an exhibit in this case. Therefore it is not part of this record. The court would reach no different result on these cross-motions even if the videotape were considered. As noted above, the court finds that the allegation of spoliation, which the videotape supports, has no bearing on the issues before the court in determining these cross-motions. The court finds that the videotape is not the proper subject of judicial notice.

IV. CONCLUSIONS

For the foregoing reasons, the court GRANTS defendant's motion for summary judgment and DENIES plaintiff's cross-motion for summary judgment. The court also DENIES plaintiff's motion for document-by-document *in*

camera review and DENIES plaintiff's request for judicial notice.

IT IS SO ORDERED.

DATED: 6-8-98

/s/ Judith N. Keep
JUDGE JUDITH N. KEEP
United States District Court
Southern District of California

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Case Number: 3:97-cv-02290

(Filed June 10, 1998)

Lynch – plaintiff

v.

Treasury – defendant

[ ] JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered

IT IS ORDERED AND ADJUDGED

Clerks Judgment: Defendant's motion for summary judgment is granted; Plaintiff's motion for summary judgment is denied; Court denies Plaintiff's mot for document-by-document in camera review and denies Plaintiff's request for judicial notice; terminating case (cc: all counsel)

6/10/98
Date

Roberta Westdal
Clerk

/s/ R. Bressi
by R. Bressi, Deputy Clerk

Entered on 6/10/98

pre – Keep
ref – Porter

THE OFFICIAL MAGAZINE OF THE
NATIONAL FIRE PROTECTION ASSOCIATION

*NFPA*JOURNAL

May/June 1998

ATF
ON CALL

ATF's National Response Teams can help local agencies investigate fires that are too big for them to handle alone.

Ed Comeau

Any fire investigation, no matter how small, requires a range of skills and disciplines. A smaller incident may be investigated by a few people from the local fire department or state fire marshal's office. If an incident is of such catastrophic proportions that an investigation would exceed the abilities of the local authority, however, there's a resource to call upon: the Bureau of Alcohol, Tobacco and Firearms; (ATF) National Response Team (NRT).

There are four NRTs distributed across the country made up of agents from throughout ATF. By bringing together a team of specialists to work on an incident, it's possible to "blitz" the incident with resources in a very short time – which is critical when conducting a fire investigation. Until proven otherwise, every fire scene is treated as a crime scene. If a crime has been committed, it's critical to gather the necessary evidence and try to apprehend the guilty party. Unless the site is secured, evidence may be lost or destroyed quickly, and witnesses' recollections can become distorted, or even fade, with time. Applying the wide range of resources available through an NRT, the local fire department has the opportunity to process a scene quickly but thoroughly.

At the request of the local authority having jurisdiction (AHJ), ATF will mobilize at least 15 NRT members and provide the local incident commanders with extensive support in determining the cause and origin of a fire or explosion. Even though ATF is a law enforcement organization, the goal of the NRT investigation isn't always to determine criminal intent. While a number of NRT investigations have resulted in arson prosecutions, the outcomes of others have determined that the fires weren't incendiary.

History of the NRTs

The first two NRTs were established in 1978 after the Organized Crime Control Act of 1970 granted ATF the authority to investigate and prosecute incidents involving explosive devices. While the act originally limited the scope of the NRTs' investigations to explosions, Special Agent Ed Garrison notes that enterprising ATF agents managed to prosecute a case where the defendants used gasoline to burn a commercial building. The theory was that gasoline, when combined with air, met the definition of an explosive and thus qualified as a crime."

Realizing that it couldn't effectively respond within 24 hours of an incident using only two teams, ATF established two more NRTs in 1980. The four teams are located in the Midwest, the Northeast, the Southeast, and the Western regions of the United States. In 1982, Congress expanded ATF's jurisdiction to include incidents involving fires as well as explosives through the Glenn Amendment, introduced by Senator John Glenn of Ohio.

Since 1978, NRTs have been activated 392 times to conduct investigations involving 492 deaths, 2,465 injuries, and property damage estimated in the billions of dollars. Among the NRTs' investigations are the world Trade Center bombing in New York City in 1993, the Oklahoma City bombing in 1995, the TWA 800 crash off Long Island in 1996, and the Olympic bombing in Atlanta in 1996.

Other investigations have included a warehouse fire in New Orleans that destroyed a 1-million-square-foot building; a fire in Seattle, Washington, that killed four firefighters; an apartment building fire in Bremerton, Washington, that killed four residents; and a bourbon distillery fire in Kentucky that resulted in more than $5 million in damage.

Responses reached an all-time high in 1997 when the NRTs were activated 39 times. They were deployed 22 times in 1996, and 19 times in 1995. In the first three months of 1998, the NRT had already been activated five times.

Structure of the NRT

Each NRT regional team involves 30 ATF agents and specialists, and each is self-sufficient in terms of skills and disciplines. An average NRT response will include 15 agents and specialists cross-trained in several of these disciplines.

Team members include a team leader, who's responsible for coordinating the NRT's operations with local officials, and a team supervisor, who manages the team,

determining the team members' assignments and ensuring that they have the necessary tools and equipment to perform their jobs. Each team also has at least one certified fire investigator (CFI), responsible for determining the origin and cause of the fire; an explosives enforcement officer (EEO), responsible for evaluating any explosive devices or remains found on the scene; and a fire protection engineer (FPE), a relatively new addition to the team. An FPE is invaluable in evaluating a building's design features, determining the role of suppression systems in a fire, and analyzing fire spread through computer modeling.

[Pictures Omitted In Printing]

The team also includes a photographer to thoroughly document the scene. The scene is also documented with schematics of the structure and its contents, the locations of the victims, and evidence.

A forensic chemist, a canine accelerant handler, and an evidence technician are also part of an NRT. The forensic chemist is responsible for gathering evidence that will be sent for further analysis to a local or state forensics laboratory or to one of ATF's labs in Rockville, Maryland; Atlanta, Georgia; or San Francisco, California. The canine handler uses dogs to determine whether accelerants were used. ATF has roughly 45 dogs paired with state or local authorities throughout the United States. The evidence technician coordinates the collection of evidence, keeps the evidence logs, and maintains the evidence chain of custody until it's turned over to the local law enforcement agency.

There are several specialties that only qualified personnel can fill, but many NRT members are cross-trained in a variety of disciplines and can fill different positions at an incident. This versatility allows for a much stronger, integrated team approach.

NFPA and ATF Partnership

NFPA's fire investigators often work closely on fire scenes with ATF in a partnership that's grown over the years as each organization realizes the skills and abilities the other has to offer. With the addition of fire protection engineers to the NRT callouts, this alliance has become even closer.

Some recent incidents at which NFPA has worked in conjunction with ATF include the World Trade Center explosion in New York; the Oklahoma City bombing; a warehouse fire in Seattle, Washington; a warehouse fire in New Orleans; the Treasury building fire in Washington, D.C.; an apartment building fire in Bremerton, Washington; and a retail store fire in Mableton, Georgia.

In addition to these responses, ATF uses NFPA's investigators as guest lecturers during training programs. NFPA is also a partner in the development of an interactive CD-ROM training program for fire investigators and is participating in the design of the new ATF fire test center in Maryland. In turn, ATF has helped NFPA develop the script for and film a new six-part video series, "Fire Investigations."

This alliance has greatly enhanced the NFPA's fire investigations team's ability to gather critical information

at fire scenes and has given ATF greater access to NFPA's broad expertise. Such a partnership has been a significant "win-win" situation for both organizations.

Training NRT members

NRT training is extremely varied because of the unusual conditions team members encounter during incidents.

"One year, the entire team was trained to use Bobcats™ for debris removal," says Special Agent Jack Malooly, who's been with the NRT program since 1980 and is both a CFI and an EEO. According to Malooly, it's often necessary to use these small front end loaders and, since a fire scene is a potential crime scene, ATF wanted to reduce the number of civilians in such areas.

Other training programs have included how to operate oxyacetylene torches, as well as teaching sessions by a pathologist. The recent addition of surveying equipment on response trucks calls for still more specialized training.

"This equipment allows us to locate and map, very accurately, the lay out of a building and the location of evidence in relation to the building," says Malooly.

The team leaders and team supervisors have also been sent to advanced EPA hazardous materials schools, and this year's training program included topics such as evidence spoliation, critical incident management, court testimony, case studies, and interviewing – all in addition to the normal training required annually.

Equipment on the NRT

To support the NRTs, ATF has 38 vehicles distributed across the United States that are essentially rolling fire investigation toolboxes. Each vehicle's equipment ranges from pop-up shelters to latex gloves. Because digging out a fire scene and collecting evidence is manual labor, each truck carries a collection of shovels, saws, brooms, and other tools.

The trucks also carry a variety of personal protective equipment, including helmets, gloves, turnout clothing, respirators, and splash suits. As part of scene safety, teams implement an accountability system using name tags for each agent.

Among the equipment used to document a fire scene are 35-mm cameras, video cameras, drafting equipment, and tape recorders. The trucks also carry a fax machine and a copier, as well as reference books, such as NFPA's *Fire Protection Handbook* and the *Fire Protection Guide to Hazardous Materials.*

In the truck are areas in which witnesses can be interviewed, video-tapes watched and copied, and equipment repaired.

ATF brings technology to the fire scene by using electronic surveying equipment, which allows investigators to map a building and the locations of debris and evidence much more accurately than they could using a tape measure. Other high-tech applications include computer models to help recreate fire scenes. All CFIs are also provided with rugged, military versions of laptop computers to use during investigations.

To help identify critical areas of a building, NRTs use global positioning systems. By identifying the longitude and latitude of a building, says Malooly, agents can get information about potential lightning strikes from the National Weather Service.

Evidence contamination is a big concern at any fire scene. To avoid cross-contamination of evidence, tools are thoroughly washed after every use and when they're being used in different areas. And wash lines are set up so everyone entering and leaving the fire scene can clean their footwear.

The trucks also carry power tools such as saws and drills. To avoid introducing any gasoline to the fire scene that might be mistaken for an accelerant, however, these tools are electrically powered by a generator on the truck.

Activating an NRT

When NRTs were first formed, the threshold for activation was property damage over a million dollars or significant loss of life or injury. However, this has been changed over the years to allow for more latitude in determining when an NRT is needed. A team can now be called in when the resources needed to investigate an incident exceed those available locally.

According to Mike Bouchard, chief of ATF's Arson and Explosives Branch, getting in touch with the local ATF special agent in charge (SAC) is the first step in activating an NRT. The local fire department or law enforcement agency asks the SAC to look into its problem, and the SAC sends a representative to evaluate the

incident. If they feel that an NRT callout is required, ATF headquarters in Washington is notified. The team leader for the NRT in that area is then notified and assembles the team from the agents available in the region. These agents are usually drawn from those assigned to the region's team, but agents from across the country can be called upon to fill out the response.

The objective is to assemble the team and be on the scene within 24 hours of activation. The local ATF office plays a pivotal role in the initial stages of an incident by providing agents to help secure the scene, to identify potential witnesses to be interviewed, and to make logistical arrangements, such as lodging and transportation. Local ATF agents continue to assist throughout the investigation in a variety of roles.

When the NRT arrives on the scene, the team leader and the team supervisor get an initial briefing from local fire and police officials. The function of the NRT is to support the local efforts.

"ATF doesn't come in and 'take over' an incident from the local incident commander," according to Bouchard. "Our goal is to work with the local authorities."

Throughout the course of the on scene investigation, briefings are held twice a day, once in the morning before work starts to outline the objectives for the day, and again at the end of the day to summarize the findings and correlate all of the information obtained. These briefings are critical to a smooth operation, since information is gathered from so many different sources. Information provided by a witness, for example, can be critical in

determining the direction that the on-scene digging may take.

The NRT has two major functions: interviewing and scene documentation and reconstruction. Both are critical in recreating the sequence of events surrounding a fire or explosion.

Interviews help the NRT identify potential witnesses who can help determine cause and origin. An agent is placed in charge of coordinating all the interviews, and a center is established to manage the activities of the interview teams and to correlate the information they obtain. Whenever possible, ATF agents and local law enforcement or fire officials conduct the interviews together.

Information from the interviews is collected in a centralized computer database called ASCMe, which stands for "advanced serial case management." This system correlates the data gathered from the myriad interviews and helps determine either common factors in, or discrepancies between, people's accounts.

Scene documentation is an arduous and time-consuming process in which all of the phases of debris removal and evidence collection are painstakingly recorded. Removing debris can be as simple as shoveling wreckage into wheelbarrows, or it may involve the use of Bobcats or heavy equipment.

Scene documentation can be physically demanding. One of Special Agent Lynne DeMent's more memorable experiences occurred one July at a hazardous materials scene in Houston, Texas, where all of the investigators spent the week wearing SCBAs in 95°F weather.

"What a week *that* was," says DeMent.

When an investigation is completed, the ATF agents and the local officials meet to determine the next course of action based on the evidence uncovered. If a criminal prosecution is warranted, the local district attorney and the local U.S. attorney become involved to decide whether the case will be tried locally or on the federal level. At this point, all the information and evidence gathered during the investigation is turned over to the local ATF office and the local authority.

On average, an NRT is on the scene for three to four days, at a cost of about $15,000, all at no cost to the local jurisdictions.

Chief Superintendent Warren McDaniels of the New Orleans Fire Department has used NRTs four times since 1991. When asked to describe how they operated, his immediate response was "highly professionally." Chief Al Duke of the Bremerton, Washington, Fire Department echoes McDaniels' sentiments. He recently asked the NRT to assist at a large apartment complex fire in which four residents died.

"The ATF brings resources to bear on an incident that are simply not available within our department," Duke says. "We would have been there three weeks trying to dig out the scene." Both chiefs emphasized how careful the ATF is to avoid the appearance of taking over an incident. At all times, the NRT team leader made sure that the team worked under the chief's direction.

As part of the federal Government Performance Review Act (GPRA), government agencies are now

required to ensure that they're responding to the needs of the people they serve. To this end, ATF conducts a follow-up survey with the AHJ after an incident is over. Bouchard notes that most surveys come back indicating overwhelming satisfaction with the level of service provided. One of the major complaints, if it could be called a complaint, is that local authorities wish the teams could remain on the scene longer.

International Response Team

Recently, the concept of the NRT was expanded to the international arena through an International Response Team (IRT).

"The IRT is activated at the request of the Department of State for any fire or explosion in the world against U.S. interests," says Bouchard. A formal agreement between ATF and the Department of State's Diplomatic Security Service was initially designed to support the Diplomatic Security Service's own investigations, but it has since been expanded to provide "technical/forensic assistance and oversight to foreign governments on foreign territory."

The IRT has responded to 13 incidents throughout the world, including vehicle bombings, embassy attacks, and assassinations in countries such as Peru, Argentina, El Salvador, Ecuador, Pakistan, Grenada, Korea, Macedonia, and Surinam. A typical IRT response is composed of at least two people – a supervisory agent and a CFI or EEO, depending upon the nature of the incident.

As the use of NRTs expands, their effectiveness improves. Faster response times, improved training and equipment, expanded staffing, and more expertise in the field are creating a valuable federal resource.

Ed Comeau is NFPA's chief fire investigator.

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Attorney for Plaintiff
PETER A. LYNCH

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PETER A. LYNCH, Plaintiff, v. DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Defendant.	CASE NO. 97-CV-2290R (POR) SUPPLEMENTAL DECLARATION OF PETER A. LYNCH DATE: May 4, 1998 TIME: 10:30 a.m. CTRM: 5 (Hon. John S. Rhodes) (Filed Mar. 17, 1998)

I, PETER A. LYNCH, do hereby depose and say:

1. I obtained a B.S. degree in criminal corrections from Illinois State University with high honors in 1981.

2. I obtained a J.D. degree from Southern Illinois University School of Law at Carbondale in 1984.

3. I was on active duty as a Captain with the United States Marine Corps from 1984 to 1987 as a criminal prosecutor and defense attorney.

4. I am a certified fire and explosion investigator. I have been certified since November 23, 1990.

5. I am a senior partner with the law firm of Cozen and O'Connor in its San Diego, California office.

6. I have handled a minimum of one hundred fire cases (overly conservative effort) with Cozen and O'Connor for corporate clients, insurers and private individuals.

7. I was originally hired by Unigard Insurance Company to assist them with their investigation of this fire loss at 5200 Southland Drive, Salt Lake City, Utah which is the basis of this FOIA action. Also hired to conduct the cause and origin investigation was Mr. Ron Campbell. The fire occurred on September 23, 1996.

8. I am the legal advisor to the San Diego County Fire and Arson Task Force. That task force is made up of local, city, county and federal fire departments working together to combat arson fires in San Diego County. Representatives from ATF are members of this task force. This task force is similar to the task force in existence in Salt Lake City, Utah.

9. I have taught courses to the San Diego County Fire and Arson Task Force. Those separate courses include instruction on fire scene spoliation of evidence and trial testimony.

10. I am a member of the California Conference of Arson Investigators. The primary mission of the California Conference of Arson Investigators (CCAI) is the reduction of arson fires through the establishment of a professional organization to improve the quality of fire investigations, reduce incidence of arson, and network information.

11. I was an instructor on spoliation of evidence at the California Conference of Arson Investigators Annual Conference, Fresno, California in 1996. The CCAI recently reprinted in its March 1988 publication my article from *Fire Engineering* (attached hereto as Exhibit "1") on spoliation of evidence at the fire scene.

12. I have written extensively on fire scene spoliation. Attached are articles recently published: Lynch, "After the Fire's Out: Spoliation of Evidence in the Line Firefighter," *Fire Engineering* (January 1998), Vol. 151, No. 1 (attached hereto as Exhibit "2"); Lynch "Watch Out for Civil Tort Liability From Spoliation of Evidence," *Fire & Arson Investigator* (June 1997) (attached hereto as Exhibit "3"); Lynch, "Mishandling Fire Claims Can Lose Court Cases," *Best's Review* (November 1996) (attached hereto as Exhibit "4"). These three articles have been reprinted throughout the country and in Canada. I have been retained as an expert witness in fire cases.

13. The acts by ATF at the scene in Utah show on the videotape, previously lodged with Judge Keep in opposition to **ATF**'s earlier motion for summary judgment, constitute spoliation of evidence at a fire scene. Evidence is mishandled and not properly collected compromising its integrity.

14. Basic evidence handling was not followed by **ATF** agents during their investigation at the fire scene which is one basis of the Freedom of Information Act request. The national standard for fire investigation is NFPA 921. The edition applicable to the investigation is the 1995 edition. Chapter 9 details how evidence is to be handled at a fire scene. Those sections are attached as Exhibit "5." Section 9-3.1 covers preservation of the fire scene.

> "The fire scene itself should be considered evidence because the examination and analysis of that fire scene is vitally important in determining the origin of the fire, the cause of the fire, and the responsibility for the fire. The preservation of the fire scene should begin with arriving fire-fighting units. Improper preservation of the fire scene will usually result in the contamination, loss, or unnecessary movement of other physical evidence within that fire scene, any one of which may reduce the evidentiary value of the physical evidence. The fire investigator should, therefore, secure the fire scene from unauthorized intrusions. Access to the fire scene should be limited to only those persons who need to be there."

15. "Fire crews should avoid causing unnecessary damage when using straight stream hose lines, pulling ceilings, breaking windows, collapsing walls, and performing overhaul and salvage. Use of power tools and gasoline- or diesel-powered equipment should be carefully monitored to guard against fuel spillage, and refueling of any

equipment should be done outside the building."

16. As can be seen from section 9-3.1, use of heavy equipment by ATF constitutes contamination, loss of unnecessary movement of other physical evidence within the fire scene reducing the evidentiary value of the physical evidence. Further, the use of the heavy equipment caused unnecessary damage to the fire scene.

17. Section 9-3.2 states concerning preservation of physical evidence:

> "The fire investigator will usually locate specific items of physical evidence within the fire scene. The movement of such physical evidence should be avoided whenever possible until it has been properly documented."

18. "Often, it will be necessary for the fire investigator to preserve and protect the specific items of physical evidence. Burn patterns on the floor, for example, may have to be roped off or covered with a tarp to prevent from being walked on. Other physical evidence may have to be covered with cardboard boxes to protect it. Whatever type of physical evidence is encountered, the fire investigator should take every reasonable precaution to preserve and protect it."

19. Based on Section 9-3.2, the use of heavy equipment to move and collect evidence is not a reasonable precaution to preserve and protect physical evidence.

20. "Section 9-4 covers contamination of physical evidence. It states, "Contamination of

> physical evidence can occur from improper methods of collection, storage, or shipment. Like improper preservation of the fire scene, any contamination of the physical evidence may reduce the evidentiary value of the physical evidence."

21. Use of heavy equipment to retrieve physical evidence placed under a chain of custody is an improper method of collection of physical evidence. That constitutes contamination of physical evidence reducing any evidentiary value of that evidence as shown on the videotape. Why would the agents of ATF be collecting physical evidence after it has been dumped on the ground by heavy equipment?

22. Section 9-5.5 discusses collection of electrical equipment and components. **ATF** in this case collected and preserved electrical components and equipment. Part of Section 9-5.5 states:

> "When practical, it is recommended that any fixtures housing such equipment and components be removed without disturbing the components within them. Electrical distribution panels, for example, should be removed intact. . . . If the removal of individual components becomes necessary, the fire investigator should be careful not to operate or manipulate them, and to carefully document their position and function in the overall electrical distribution system."

How can **ATF** justify removing electrical junction boxes and related physical evidence while dropping them on

the ground? That is not consistent with the requirements of Section 9-5.5.

23. How can ATF justify its handling of key physical evidence with heavy equipment? Mr. Campbell's previously filed declaration concludes the use of heavy equipment to retrieve physical evidence constitutes spoliation of evidence. I agree. That is the only rational conclusion based on NFPA 921.

24. The only reason why **ATF** is not releasing its report now is because it will confirm the destruction of key physical evidence at the fire scene potentially constituting a tort. **ATF** is trying to silence any criticism of its investigative mishaps by withholding the report and photographs. Query, how can photographs disclose the target of the criminal investigation? Clearly, there was no arsonist found at the fire scene related to this fire. **ATF** does not have photographs of its suspects. **ATF** has photographs of the fire scene showing how it mishandled it. After my article in *Fire Engineering* which used the photographs of **ATF** mishandling evidence, Mr. Campbell was contacted by an **ATF** agent. That **ATF** agent criticized the article and claimed **ATF** would rethink providing access to fire scenes in the future based on criticism contained in that article.

25. Standard fire texts such as *Kirk's Fire Investigation,* 4th Ed., also caution fire investigators from damaging evidence at a fire scene. Attached as Exhibit "6." That test states at page 192:

> "Preservation of evidence means just that – preserve it until it reaches the laboratory or court. Preservation, via proper collection

> and packaging, means the evidence is not allowed to change by . . . breaking, spoiling, or being contaminated. . . . With fragile objects, avoid further breakage by padding in suitable containers and hand-carry to the lab."

No competent fire investigator would even try to argue that using heavy equipment to retrieve brittle electrical equipment is proper.

26. There is public interest in this case based on the newspaper article previously lodged about the fire, the articles I wrote, and previous Congressional hearings about **ATF**'s actions at Waco, Texas and Ruby Ridge.

27. The court should see the claim of an ongoing criminal investigation as a sham to hide **ATF**'s misconduct and evidence handling from the public. The public, myself and **UNIGARD** have a right to know about the mishandling of key physical evidence by **ATF**. **ATF**'s declarations provide no authorities to contradict NFPA 921 and *Kirk's Fire Investigation* on correct evidence handling.

28. What is particularly important for the court to note is J. Rick Miller of the U.S. Bureau of Alcohol, Tobacco and Firearms served on the Technical Committee on Fire Investigations, NFPA 921. **ATF** cannot claim ignorance of the national standard on how to preserve evidence at a fire scene when one of its agents served on the committee promulgating NFPA 921.

29. This court should deny **ATF**'s motion and order disclosure because **ATF**'s acts are to protect its own image, not an ongoing criminal investigation.

30. The editor of *Kirk's Fire Investigations* (Fourth Edition) in his preface states:

> "The author's extensive experience in the analysis of explosive materials and investigations of explosion scenes as a member of the U.S. Treasury Department, Bureau of Alcohol, Tobacco and Firearms is reflected in the material in those topics in this edition."

This is attached as Exhibit "6."

Further, the acknowledgements section notes the input of **ATF** agents Jerry Taylor, Gus Gary and Larry McCune attached as Exhibit "7."

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct as to the best of my knowledge. Executed this 13th day of March, 1998 at San Diego, California.

/s/ Peter A. Lynch
PETER A. LYNCH

FIRE ENGINEERING

TRAINING THE FIRE SERVICE FOR 121 YEARS • JANUARY 1998

AFTER THE FIRE'S OUT:

SPOLIATION OF EVIDENCE

A-N-D-T-H-E

LINE FIREFIGHTER

BY PETER A. LYNCH

Frequently in suppressing and overhauling a fire, a firefighter faces the dilemma of what to do with evidence. Should he save it? Should he move it? Where should it be stored? Can it be taken apart? Should anyone be called before evidence is disturbed? Should the evidence be discarded? Focusing on how these issues are handled is of concern because of the dangers presented by the developing tort of spoliation of evidence, which is civil liability for damaging or destroying physical evidence at a fire scene.

■ **PETER A. LYNCH** is a senior member of the national law firm of Cozen and O'Connor, P.C. in its San Diego regional office. The major emphasis of his practice is the representation of individuals, companies, and insurers that arise from fire losses to include personal injury, subrogation, coverage, and defense matters. He has written and published more than 20 articles, has lectured extensively on fire litigation topics, and has been retained as an expert witness. He is the legal advisor to the San Diego County-Wide Fire and Arson Task Force.

Firefighters are normally immune from a spoilation claim when evidence is impacted by extinguishing a fire. They also have civil immunity if the fire department assigns them to investigate the fire's cause and origin. However, if the firefighter has been informed of a potential civil action and evidence is negligently destroyed thereafter, potential liability for spoliation of evidence may arise. Further, damaging evidence after a firefighter's duties have been completed can constitute spoliation of evidence. That may subject a normally immune firefighter to civil tort liability.

OVERVIEW OF SPOLIATION

In California, the recognized elements of negligent spoliation of evidence are the following:

- Plaintiff possessed a potential defense to a claim for damages against a defendant.

- Defendant knew or reasonably should have known of this claim for damages by plaintiff.

- Defendant knew or reasonably should have known of the existence of the physical evidence and knew or reasonably should have known that it might constitute evidence in pending litigation involving plaintiff.

- Defendant knew or reasonably should have known that if he did not act with reasonable care to preserve the physical evidence, the potential evidence could be destroyed, damaged, lost, or concealed.

- Defendant failed to act with reasonable care.

- Defendant's failure to act with reasonable care caused the destruction of, damage to, or loss or concealment of such evidence.

- As a result, plaintiff sustained damage, namely plaintiff's opportunity to prove its claim was interfered with substantially.[1]

Consider the following scenario: A firefighter or fire investigator tells others he will preserve a piece of evidence after a fire has been suppressed. He then fails to save the evidence or damages it. He is then accused of mishandling evidence. He may be subject to liability for negligent or intentional spoliation of evidence.

Claims of governmental immunity for firefighters are covered by discretionary immunity. For example, under California Singular Government Code Section 820.2, that immunity may not apply where the firefighter has fulfilled all his duties and is performing an intentional or negligent act outside the scope of his duties. This assumes his official duties are completed and he later damages evidence at the scene. [See, *Clemente v. State* (1985) 40 Cal.3d 202 (affirmed applying law of the case).]

In *Clemente,* a police officer's acts in the course of an investigation of a traffic accident were held to be outside the scope of his discretionary immunities, and he was subject to civil liability. The Appellate Court opinion affirmed by the California Supreme Court stated as follows:

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[1] See BAJI No. 7.96. BAJI No. 7.97 defines the elements of intentional spoliation of evidence.

> "What is involved under these allegations is not the discretion of Officer Lexom in deciding whether to investigate a traffic accident, pursuant to the discretionary authority vested in him by Vehicle Code Section 2412 . . . but instead only his negligence in his conduct of the discretionary investigation. Neither the discretionary immunity of Government Code Section 820.2 nor the more specific discretionary immunity of failure to enforce a statute . . . immunizes the officer and the state from legal consequences of this negligence. . . . Government, through its agents, is held to the same standard of care that law requires of private citizens in the performance of duties imposed or assumed." [*Clemente v. State* (1980) 101 Cal.App.3d 374, 379, affirmed, *Clemente v. State* (1985) 40 Cal.3d 202.]

Arguably, this same analysis from *Clemente* could apply to firefighters. That may defeat the standard government immunity of a firefighter. Because firefighters face potential liability for intentional or negligent spoliation of evidence, they need to understand these torts to avoid liability for destruction of evidence at a fire scene. I believe a claim of governmental immunity may not protect a firefighter if the destructive conduct happened after his normal duties had been concluded. That result follows because his acts may be outside the scope of his employment.

SPOLIATION DEFINED

Spoliation of evidence is the destruction of or failure to save evidence that could have been used by another in future litigation. Currently, remedies for spoliation of

evidence include criminal penalties, adverse inferences, sanctions, and spoliation tort liability. [*Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, 907.]

PENALTIES FOR SPOLIATION

California places criminal liability on parties who willfully destroy or conceal any book, paper, or other matter to be used as evidence at trial – California Penal Code Section 135; *People v. Fields* (1980) 105 Cal.App.3d 341. California's Evidence Code and several California cases hold that when a party fails to produce evidence that would normally have been produced, the trier of fact may infer that the evidence not produced was adverse to the party. [*See,* California Evidence Code Section 413 and 913; *Breland v. Traylor Engineering & Manufacturing Company* (1942) 52 Cal.App.2d 415, 426.]

California courts can sanction parties if the court determines a party has spoliated evidence. The court will first impose monetary sanctions. For more serious violations, a court may impose evidence sanctions and terminating sanctions. These remedies generally are applied in civil actions. [*Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, 907.]

CIVIL CASE LAW ON SPOLIATION

In *Puritan Insurance Co. v. Superior Court* (1985) 171 Cal.App.3d 877, a defense expert misplaced a drive shaft that would have been the central focus of the plaintiff's personal injury case. The court directed the defendant to produce the drive shaft. When the defendant did not

comply, the court sanctioned the defendant by refusing to allow testimony from the defendant's expert related to his examination of the missing drive shaft.

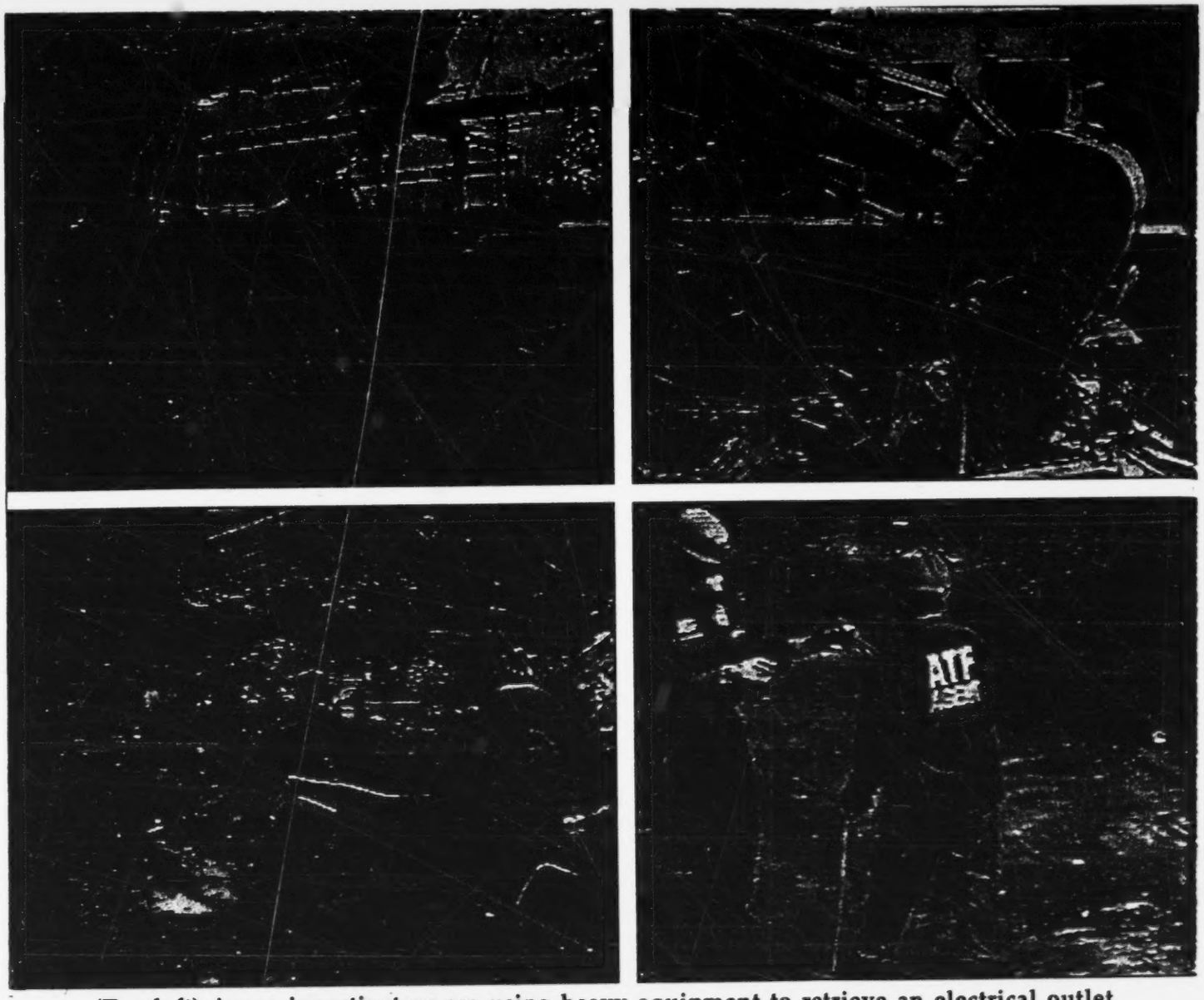
In *Kuhns v. State of California* (1992) 8 Cal.App.4th 982, the defendant in a personal injury case refused to turn over documents relevant to highway design. The plaintiff had been severely injured when his vehicle turned over on the highway. In sanctioning the defendant the court ordered the defendant to admit that the highway was dangerous and the defendant had knowledge of the danger. The court also went on to preclude a design immunity defense.

California was the first jurisdiction to officially recognize the tort of spoliation of evidence. In *Smith v. Superior Court* (1984) 151 Cal.App.3d 491, the defendant, Smith, was blinded when a wheel fell off a passing van and hit the windshield of her car. The van was towed to a Ford dealer that had recently installed customized wheels on it. The dealer promised Smith that it would preserve certain parts of the van so that Smith's experts could test them. The dealer subsequently lost or destroyed the parts Smith had requested be saved. This made it impossible for Smith's experts to pinpoint the exact cause of the wheel's coming off the van. Smith sued the dealer, claiming intentional spoliation of evidence. The court opined that the dealer's loss of parts it had promised to preserve severely prejudiced Smith's probability of recovering damages for her injuries. The trial court sustained the defendant's demurrer. The appellate court reversed, holding that Smith had stated a cause of action for intentional spoliation of evidence.

Soon after *Smith*, the California courts expanded the tort of spoliation of evidence to include negligent

behavior. In *Velasco v. Commercial Bldg. & Maintenance Co.* (1985) 169 Cal.App.3d 874, plaintiffs were injured by an exploding bottle. They brought the pieces of the bottle to an attorney. The attorney placed the bottle pieces in a paper bag and left the bag on his desk overnight. The attorney's maintenance company accidentally mistook the bag for trash and disposed of the bag while cleaning the attorney's office. The court held that plaintiffs could maintain a cause of action for negligent spoliation of evidence needed in pending litigation. *Id.* at 877. Further, the court made it clear that a cause of action for spoliation exists whether or not the spoliator had any prior connection to the spoliation victim.

One element in *Smith* and *Velasco* was that the party suing under a spoliation theory asked the party who spoliated the evidence to preserve the evidence. When a party is not asked to preserve evidence, a claim for spoliation of evidence may not lie. In *Reid v. State Farm Mutual Auto Insurance Co.* (1985) 173 Cal.App.3d 557, Reid was involved in a one-car accident. Later, insurance investigators determined that the accident was due to inattentiveness on Reid's part. About one month after the accident, the insurance company informed Reid that it had sold the damaged car to a wrecking yard. The car was cut up and sold for parts about one month later. During this period, neither Reid nor his attorneys communicated their belief to the insurance company that the car may have been defective. They did not ask the insurance company to preserve the car. Reid did not attempt to find out where the car was until more than a year after the accident had occurred. Reid filed suit against the insurance company, claiming that it had destroyed the car, breaching the covenant of good faith and fair dealing.



(Top left) Arson investigators are using heavy equipment to retrieve an electrical outlet box from a fire scene in Utah. The electrical outlet box was later placed under a chaim of custody and is in storage now. How do you predict a jury will react to that evidence? (Top right) Dropping physical evidence on the ground. (Bottom left and bottom right) Collecting an electrical outlet from the dropped material. (Photos by Ronald A. Campbell, fire investigator.)

The Court of Appeals rejected Reid's claim. It noted that the insurance company had no duty to preserve the car for Reid since the car was not considered a possible cause of the accident when it was sent to the wrecking yard. Further, Reid never requested that the car be saved. Quoting *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434, 435, the court noted, " 'the most important of these considerations in establishing duty is foreseeability. As a general principal, a defendant owes a duty of care to all persons who are *foreseeably* endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.' " [*Reid* at 575. See also *Fern Durham v. Condor Insurance Company* (1997) 57 Cal.App.4th 24.]

In *Maria G. Gomez v. James Acquistance* (1996) 50 Cal.App.4th 740, Jose Luis Gomez choked to death at work when his clothing became tangled in a powered post hole digger. A few days later, his employer destroyed the post hole digger. Jose's widow sued for negligent and intentional spoliation of evidence, alleging that destruction of the post hole digger prevented her from recovering damages in a third-party action against the manufacturer. The trial court granted the employer's motion of summary judgment, finding no spoliation of evidence and holding California's workers' compensation scheme barred the action against the employer. The Court of Appeals reversed. The employee admitted it intentionally ordered the post hole digger destroyed. However, the employer argued that the destruction was to protect other employees from getting injured while using that piece of equipment. The court held the widow's intentional spoliation of evidence cause of action was

adequate because it alleged the defendant destroyed an object that might constitute evidence in a lawsuit with the purpose of harming the lawsuit or when harm to the lawsuit is substantially certain to follow. The court also rejected the exclusive remedy rule of the workers' compensation scheme. The court held destruction of the evidence fell outside of the exclusive remedy because the damage was not an injury within the meaning of the workers' compensation statutes. Moreover, the employee's widow's cause of action for negligent spoliation accrued at the earliest, when the post hole digger was destroyed. At that time, the former employee was no longer employed and no longer subject to provisions of the Labor Code.

The court then noted a strong argument in favor of the tort of spoliation of evidence. The court stated the widow argued that spoliation is not a normal incident of employment because the average worker has no reason to expect his employer will destroy equipment or other evidence of the cause of an industrial injury. California has a fundamental public policy to protect the integrity of civil litigation by encouraging the preservation and disclosure of evidence. While occasional injuries from defective work equipment may be an expected incident of employment, workers should not be expected to anticipate the almost immediate destruction of such equipment after an industrial accident. The court would not assume that most employers routinely destroy equipment or other relevant objects after industrial accidents. It suggested employers could protect themselves against liability for spoliation by preserving such objects, at least until they determine whether the affected employee

intends to pursue a third party action. Consequently, the Court of Appeals reversed the summary judgment earlier granted to the employer.

STATUTE OF LIMITATIONS

The statute of limitations for spoliation claims in California is two years. The court in *Augusta v. United Services Automobile Association* (1993) 13 Cal.App.4th 4, held that the two-year statute of limitations outlined in California Code of Civil Procedure Section 339 (1) (Obligation where liability is not found in a written instrument) applies to a cause of action for spoliation of evidence. Third parties may sue for negligent spoliation of evidence if they can show a special relationship between themselves and the party destroyed the evidence. [*DeVera v. Long Beach Transp. Co.* (1986) 180 Cal.App.3d 782, 795.]

OTHER JURISDICTIONS

A brief noninclusive listing of other jurisdictions' discussion of the issue follows: *Bondu v. Gurvich* (Fla.Dist.Ct.App. 1984) 473 So.2d 1307; *Hazen v. Municipality of Anchorage* (Alaska 1986) 718 P.2d 456; *La Raia v. Superior Court* (1986) 150 Ariz. 118, 722 P.2d 286; *Gardner v. Blackston* (1988) 185GA.App.754, 365 S.E.2d 545; *Murray v. Farmers Ins. Co.* (1990) 118 Idaho 224, 796 P.2d 101; *Rodgers v. St. Mary's Hosp. of Decatur* (1992) 149 Ill.2d 302, 597 N.E.2d 616, 620; *Foster v. Lawrence Memorial Hosp.* (D.Kan. 1992) 809 F.Supp.831, 838. Ohio and New Jersey recognize a tort of "fraudulent destruction of evidence." See *Smith v. Howard Johnson Co., Inc.* (1993) 67 Ohio St.3d 28; *Hirsch v. General Motors Corp.* (1993) 266 N.J.Super.22,

628 A.2d 1108; *Rodriguez v. Webb* (N.H. 1966) 680 A.2d 604.

PRACTICE POINTERS

Protecting life and property are goals of the fire service. Fires have to be put out, which requires physical items at the scene to be altered or destroyed. This article is directed to firefighters who are at the scene after the fire has been extinguished and overhaul has been completed. It can include fire investigators of a public agency after the fire has been determined to be accidental.

Once you understand the tort of spoliation of evidence, you can apply it to avoid such claims against you. Even though a firefighter is generally immune from spoliating evidence, it may hinder the criminal arson prosecution by giving a criminal defense attorney an argument to suggest the prosecutor's case is not trustworthy because the evidence was mishandled. Does the O.J. Simpson rush-the-judgment defense come to mind?

The physical remains of an item that is the suspected cause of an arson fire should be kept for later use at trial. This might include evidence of accelerants, matches, or other devices used to set the fire.

Where physical evidence is to be removed from the scene of a fire for further examination by an expert, first photograph the physical evidence in place before it is disturbed; again while it is being removed; and, finally, after its removal. Prepare a detailed log indicating the date, time, and direction of each photograph, as well as the identity of the photographer. This information may be

critical in determining the claim of custody of the physical evidence and in demonstrating that its removal did not disturb or alter the evidence in any significant way.

The physical evidence may have been seriously damaged in the fire. Take great care to ensure that all pieces of the item suspected of causing the accident are retained. An important component later found missing may result in a failure in proof and give rise to other plausible arguments as to negligent causation of the fire.

Do not limit your preservation of physical evidence to the suspected cause of the fire. Photograph and retain if possible also other objects located in the same general area that could have caused the fire, such as appliances, electrical line cords, wall outlets, and other potential sources of ignition. Do not discard such items simply because they have been ruled out as a potential cause of the arson fire. It is important that they be properly retained to corroborate the accuracy of the cause and origin conclusion and to document the thoroughness of the examination.

It is not unusual to find that a particular piece of equipment suspected of causing the fire has almost been totally destroyed by the arson fire itself. If this is the case, it is important for you to check to see whether the premises contain additional identical items. In such circumstances, retain these items to allow comparisons between the severely damaged evidence and its twin.

If you have taken an item of physical evidence into custody yourself, always alert all known parties in writing that you have taken the evidence and stored it and that you will make it available for a nondestructive,

visual inspection between certain fixed dates. Say in your letter that your scientific expert will then propose a method for testing and analysis that can be circulated for comment and approval among other experts before any destructive analysis or testing is performed.

Sending such a letter should prevent claims that you have destroyed essential evidence before the parties have had a proper chance to inspect and analyze it.

CONCLUSION

Justice requires that evidence be handled properly. The results of criminal and civil cases are altered when evidence is mishandled or destroyed. A trial is a search for the truth, not a fanciful recreation of one party's theory of how a fire progressed. Juries decide cases based on the evidence presented – not speculation. If evidence is altered, or destroyed, the jury's decision is necessarily detrimentally impacted.

Firefighters are sworn to uphold federal, state, and local laws. That includes proper handling of evidence. Our justice system depends on the proper preservation of evidence so that juries can reach correct results.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNIGARD INSURANCE COMPANY, Plaintiff, v. DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Defendant.	CASE NO. 97-CV-1126K (AJB) DECLARATION OF RONALD A. CAMPBELL IN OPPOSITION TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT DATE: November 17, 1997 TIME: 10:30 a.m. CTRM: 16 (5th Fl.) (Hon. Judith N. Keep)

I, RONALD A. CAMPBELL, do hereby depose and say:

1. I am a Certified Fire Investigator. I was with the Pendleton Fire Department for 27 years. I retired and have operated a fire investigation business for the past

seven (7) years. I have taught fire cause classes at colleges.

2. I received the President's Award for Outstanding Public Service in 1988. I was named the Oregon Fire Investigator of the Year in 1989. I was given an award of Recognition in 1990 by the International Arson Investigators Association.

3. I was hired by UNIGARD INSURANCE COMPANY ("UNIGARD") to investigate the fire loss at 5200 South Highland Drive, Salt Lake City, Utah 84101. That fire happened in the early morning hours of September 23, 1996. I arrived at the scene on that day.

4. Attached to the Notice of Lodgement is a videotape I made of the BUREAU OF ALCOHOL, TOBACCO & FIREARMS' ("ATF") conduct at the site. ATF directed UNIGARD to bring heavy equipment to the site. ATF's use of heavy equipment destroyed key physical evidence to include fire patterns on the structure. ATF's use of heavy equipment to retrieve physical evidence later put under a chain of custody cannot be justified. Said equipment more likely than not suffered damage as a result of the use of that heavy equipment. It likely constitutes a break in the chain of custody and potentially spoliated evidence.

5. I was precluded by ATF from properly retrieving that evidence. In my opinion, the use of heavy equipment was not warranted and likely damaged that physical evidence at the scene.

6. I do not believe there is any ongoing investigation into the matter based on ATF's closure of its file without a prosecution being initiated.

7. I have not been advised of any newly discovered evidence about this fire. Salt Lake City Fire Department and ATF know I investigated the fire for UNIGARD. I have not been contacted by them concerning any newly discovered evidence.

8. Based on my thirty-four years of experience in investigating fires, because ATF closed its file, there is no realistic probability that any enforcement proceeding at the state or local level will ever go forward.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 19th day of September, 1979.

/s/ Ronald A. Campbell
RONALD A. CAMPBELL
Certified Fire Investigator
Great Pacific Fire
Investigations